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Private Schools Must Integrate

David C. Briggs

PRIVATE SCHOOLS MUST INTEGRATE?

David C. Briggs (ed.)*

Since the *Brown v. Board of Education*[1] decision the difficulties surrounding the integration of public schools have received such widespread publicity, that little public attention has been given the possibility that private schools may also be required to integrate. However, during the period following the *Brown* case, the scope of "state action" has been gradually extended by the courts. Discrimination formerly considered merely private action has been found to be within the prohibition of the fourteenth amendment. In April 1962, the decision in *Guillory v. Tulane Univ.*[2] presented the question of whether private schools may continue to discriminate.

Because of considerable interest in this question, a hypothetical case with a fact situation similar to that in the *Guillory* case was recently argued before the Texas Supreme Court by the Case Club[3] of Southern Methodist University Law School. Arguments from both briefs are presented here in an adapted form. In this hypothetical case in the Supreme Court of the mythical State of Rhea, Marshall Smith, a Negro, sought admission to Wheat University, where he was denied admittance solely on the basis of his race. The trial court granted the University's motion for summary judgment and this was affirmed by the court of civil appeals.

Wheat University was founded in the City of Pottsville in 1924 through the efforts of a private group who raised 10,000,000 dollars through charitable contributions. The University was granted a charter by the State of Rhea as a private, non-profit, educational corporation. The charter contained a provision specifying that Wheat University was to educate only students of Caucasian ancestry. The University was granted an exemption from state, county, and local taxes, the monetary benefit of which has amounted to a total of 800,000 dollars. Since 1924, one hundred million dollars in charitable contributions have been granted to Wheat. All of this has been considered deductible for federal income tax purposes.

In 1936, a fifty-acre tract was conveyed to the University in determinable fee by Mr. and Mrs. Walsh. The deed provided that title to the land would automatically revert to the Walsh estate if

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[1] 347 U.S. 483 (1954).

[2] — F. Supp. — (E.D. La. 1962).

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it should ever be used for a purpose other than the education of students of the Caucasian race. In 1960 a men's dormitory was constructed on the Walsh tract with the aid of a three million dollar loan extended by the federal government through the Housing and Home Finance Agency. The present value of the tract is five million dollars.

Petitioner, Marshall Smith, a life-long citizen of Pottsville, applied for admission to Wheat University within the proper time and according to the regulations of the University; he asked to be enrolled in the freshman class entering the school in September 1961. Smith's grades, recommendations, and qualifications were such that if he were a Caucasian he would have been admitted to the University. The University admitted that the sole reason for his rejection was his race.

I. The Case for Integration

A. *The Automatic Reverter*

Respondents seek to exclude the Petitioner from Wheat University by arguing that alleged "irreparable injury" would result from the admission of a non-Caucasian student. This supposed injury would result from the reversion of the Walsh property to his heirs. The court below justified its decision by stating:

> The material value of this loss alone would amount to $5,000,000. . . . [The] right [of association] should not be purchased at so great a cost as asked by the appellant here.

This justification is invalid because:

(1) The property would *not* revert to the Walsh heirs, and

(2) Even if it would, its reversion could not be asserted as a defense to Petitioner's rights.

The property would not revert to the Walsh heirs because perfection of the title in the Walsh heirs would require either (a) that the University voluntarily abandon the property, or (b) that action in the courts be brought to compel the University to abandon the property.

In the first alternative, it is obvious that the University cannot assert its own voluntary action as a bar to Petitioner's admission. Thus, the only action which the University could assert in defense of its refusal to admit Petitioner would be the adverse result of court action by the Walsh heirs against the University. Any judgment of a court in such an action in favor of the heirs would be state action enforcing discrimination in contravention of the equal pro-

tection clause of the fourteenth amendment of the Constitution of the United States and art. 1, sec. 3 of the Texas Constitution. Thus, the property could not revert to the heirs.

The court below cited four cases which do not sustain its holding. The three state cases[4] are identical in their facts, but prior in time, to *Shelley v. Kraemer*.[5] These three state cases are no longer the law. The other case, *Corrigan v. Buckley*,[6] was carefully distinguished in *Shelley*,[7] as raising no question involving either the fifth or the fourteenth amendments. There is no legal basis for holding that the property would revert. On the contrary, it is clear that Walsh's heirs may not use the courts to compel the University to discriminate.[8] This very principle has been applied in Texas.[9]

Respondent argues that a distinction must be drawn on the basis of the "automatic" aspect of the reverter, citing *Charlotte Park & Recreation Comm'n v. Barringer*.[10] The North Carolina court in that case found a distinction between a right of entry and a condition subsequent, holding that the latter did not require state action to enforce it. Petitioner submits that the case is completely erroneous. Significantly, no published comment on the *Barringer* case has approved it.[11] Moreover, it is obvious that the very spirit of *Shelley v. Kraemer* is violated by such a holding.[12] If the court should follow such strained reasoning, constitutional rights would be "inevitably measurable in terms of ancient niceties of . . . real property law," and such action cannot be tolerated by the Constitution.[13]

But, even if Respondent were correct in asserting that court action would not be required to make the reverter meaningful, the very fact that the reversion is to work by "operation of law" is sufficient

[4] Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 Pac. 596 (1919); Meade v. Dennistone, 173 Md. 295, 196 Atl. 330 (1938); Parmalee v. Morris, 218 Mich. 625, 188 N.W. 330 (1922).

[5] 334 U.S. 1 (1948).

[6] 271 U.S. 323 (1926).

[7] 334 U.S. at 8-9.

[8] Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948).

[9] Clifton v. Puente, 218 S.W.2d 272 (Tex. Civ. App. 1948 — San Antonio) *error ref. n.r.e.* Justice Norvell held on the authority of *Shelley v. Kraemer* that a restriction in a deed which prohibited sale to a Mexican could not be enforced by the court, because so to do would be state action enforcing discrimination in violation of the equal protection clause of the fourteenth amendment.

[10] 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956).

[11] Recent Case, 60 Dick. L. Rev. 191 (1956); Recent Decision, 54 Mich. L. Rev. 698 (1956); Case Note, 35 Neb. L. Rev. 136 (1955); Case Note, 34 N.C.L. Rev. 113 (1955); Recent Case, 32 N.D.L. Rev. 61 (1956); Case Note, 3 U.C.L.A.L. Rev. 243 (1956); Recent Decision, 17 U. Pitt. L. Rev. 478 (1956); Recent Case, 9 Vand. L. Rev. 561 (1956).

[12] See Note, 30 Ind. L.J. 366, 373 (1955).

[13] Chapman v. United States, 365 U.S. 610, 617 (1961); Silverman v. United States, 365 U.S. 505, 511 (1961); Jones v. United States, 362 U.S. 257, 266-67 (1960); Recent Casenote, 14 Sw. L.J. 521, 525 (1960).

to invalidate it, for when the force of *law* is brought to bear to enforce or uphold discrimination, equal protection of the *laws* is denied.[14] The language of Mr. Justice Clark, when he was Attorney General, in his brief as amicus curiae in *Shelley v. Kraemer,* is appropriate:

> Racial discriminations which are merely the wrongful acts of individuals can remain outside the ban of the Constitution only so long as they are unsupported by state authority in the shape of *laws,* customs, or judicial or executive proceedings.[15]

Thus, it is clear that action of the courts is not necessary to invalidate the reverter in this case. The mere fact that it purports to act by "operation of law" is sufficient to bring it within the scope of the prohibition of the fourteenth amendment. The contention that court action is the only kind of state action has no validity. As Justice Brandeis said:

> [L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State . . . [is] the law of that State existing by the authority of that State. . . .[16]

The "law" can no more discriminate than the courts or the legislature. Individuals may; but only by their voluntary act and not under the compulsion of the law, either directly or indirectly. Wheat University cannot be ousted from the Walsh tract.

Recently, a case identical to the present one has been decided in the manner which Petitioner urges. In *Guillory v. Tulane Univ.,*[17] the federal district court ordered the integration of Tulane University. In that case also, there were private gifts with discrimination clauses. The court stated:

> Nor do the white restrictions in some of the donations to the University supply a constitutional basis for racial discrimination. Whatever effect they may have, these conditions cannot affect the University's admissions policy. Insofar as they would require exclusion of any racial group, they are judicially unenforceable.

However, even if the reversion could in some way be effective, it is clear that this would be no defense to the denial of Petitioner's

[14] Civil Rights Cases, 109 U.S. 3 (1883).

[15] Brief for the United States as Amicus Curiae, 92 L. Ed. 1165, Shelley v. Kraemer, 334 U.S. 1 (1948). (Emphasis added.)

[16] Erie R.R. v. Tompkins, 304 U.S. 64, 79 (1938). Justice Brandeis quoted from Justice Holmes' dissenting opinion in Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, 533 (1928).

[17] — F. Supp. — (E.D. La. 1962).

constitutional rights. In *Cooper v. Aaron*,[18] the Court refused to deny the enforcement of constitutional rights in spite of the existence of local prejudice and the danger of violence and riots if they were enforced. The Court said:

> The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and the Legislature . . . law and order are not here to be preserved by depriving the Negro children of their constitutional rights.[19]

Surely, it cannot be seriously contended that the speculative and conjectural loss of a tract of land is comparable in gravity to threatened civil disorder. Petitioner's constitutional right must take precedence. As Judge Wright said in *Guillory v. Tulane Univ.*:

> Whether or not the state courts ultimately determine that Tulane is bound by the restrictions in the donations it has accepted, the University cannot constitutionally be compelled to honor racially discriminatory conditions.[20]

But, even if the loss were certain, Respondent's position would be no different, for the test of the right to challenge constitutionality is "whether the damage claimed springs directly to plaintiffs from defendants. If it is incidental, if it is indirect, defendant may not invoke the court's jurisdiction."[21] The court below stated that petitioner's rights "should not be purchased at so great a cost. . . ." Petitioner's rights cannot be purchased at any price. They are "freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth."[22]

B. *The State Charter*

1. *Impairment of Contract*

Wheat University, in 1924, obtained from the State of Rhea a special charter as a non-profit charitable corporation. The grant of the charter to the University was an act of grace on the part of the State of Rhea; it could not be compelled.[23]

However, Respondent contended below that since the charter granted to Wheat University by the State of Rhea contained an express provision that a purpose of the university was "the educa-

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[18] 358 U.S. 1 (1958).
[19] *Id.* at 16.
[20] — F. Supp. — (E.D. La. 1962).
[21] Ex-Cell-O Corp. v. City of Chicago, 115 F.2d 627, 629 (7th Cir. 1940).
[22] Cooper v. Aaron, 358 U.S. 1, 20 (1958).
[23] A. B. Frank Co. v. Latham, 145 Tex. 30, 193 S.W.2d 671 (1946).

tion of students of Caucasian ancestry only," it is constitutionally guaranteed the right to discriminate because of race in formulating and administering its admission policy. The flaw in this contention is that the contractual provision concerned here is not a valid one—and never was!

The Constitution of the United States is not such an impotent and easily circumvented instrument as Respondent would have the court believe. It is not shorn of its vitality and authority simply because a State purports to enter into a contract. A State cannot, even indirectly, obviate the federal constitution,[24] nor will an indiscriminate imposition of inequalities satisfy the Constitution.[25] Whenever a state is a party to a contract containing a provision repugnant to the Constitution, the offending provision is void *ab initio*.[26] A binding contract must first exist before a contract can be impaired.

Since Rhea was under no compulsion to grant a charter to Wheat University, it was not *compelled* to lend its aid to a racially discriminatory scheme. It could have declined to become a party to a contract patently attempting to perpetuate a pattern of racial discrimination. Instead, it blessed it. It dignified it. It embraced it. The sovereign State of Rhea purported to *bind* itself *and the university* by a contractual provision limiting the purpose of the new university to the education of students "of Caucasian ancestry only." There can be no doubt that Rhea actively and positively fostered racial discrimination among its citizens. And State action of this sort is abominable to the federal constitution. Measure the words of Chief Justice Vinson speaking for an undivided court in *Shelley v. Kraemer*:

> Nor is the [Fourteenth] Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action as that term is understood for purposes of the Fourteenth Amendment, refers to the exertion of State power *in all forms*. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the Constitutional commands.[27]

This court need have no fear of impairing the contractual right of Wheat University to admit students "of Caucasian ancestry only." No such right exists, for in law, there is no such provision in the charter. The provision was void *ab initio* because the attempt by

[24] Northern Sec. Co. v. United States, 193 U.S. 197 (1904).
[25] Shelley v. Kraemer, 334 U.S. 1 (1948).
[26] Chicago, R.I. & P. Ry. v. Taylor, 79 Okla. 142, 192 Pac. 349 (1920).
[27] 334 U.S. at 20.

Rhea to bind itself in such a way was an unconstitutional exercise of its power. A void contractual right cannot be impaired.[28]

Even assuming, arguendo, that only private racial discrimination is here involved, it is no help to Respondent that, in 1924 when the charter was granted, it had not yet been *decided* that a State may not constitutionally lend the weight of its authority in aid of private racial discrimination. State action otherwise void as unconstitutional is not made valid by ignorance of its true character.[29]

2. *The Power to Discriminate*

Respondent also contends that because it was organized as a private non-profit corporation it is free to engage in racial discrimination to the same extent that a private *natural* person may do. This notion is demonstrably incorrect.

As Respondent points out, the fourteenth amendment does not condemn racial discrimination *per se;* it only forbids the State, or an instrumentality of the State, to engage in such discrimination,[30] or to promote or lend its power in aid of private racial discrimination.[31] But Respondent fails to mention that *if the State is without power to practice racial discrimination, an entity created by the State—possessing no powers except those vested in it by the State—is equally without power to do so.*

The corporate person is purely a creation of the State.[32] A corporation has no being, no existence, no status in the eyes of the law until the generative power of the State is brought to bear. Inexorable logic, as well as law, compels the admission that the corporation cannot possess greater power than the State itself possesses.

Chief Justice Marshall expressed it this way:

> Without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it, to derive all its power from that act, and to be capable of exercising its faculties only in the manner which that act authorizes.
>
> To this source of its being then, we must recur to ascertain its powers. . . .[33]

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[28] New Orleans v. New Orleans Water Works Co., 142 U.S. 79 (1891); Shumaker v. Borough of Dalton, 51 F.2d 793 (M.D. Pa. 1931).

[29] Shelley v. Kraemer, 334 U.S. 1 (1948); Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947), *cert denied,* 333 U.S. 875 (1948).

[30] Civil Rights Cases, 109 U.S. 3 (1883).

[31] Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948).

[32] Head & Armory v. Providence Ins. Co., 6 U.S. (2 Cranch) 127 (1804); A. B. Frank Co. v. Latham, 145 Tex. 30, 193 S.W.2d 671 (1946).

[33] Head & Armory v. Providence Ins. Co., *supra* note 32, at 167.

It is well settled that a State cannot constitutionally discriminate on the basis of race.[34] It cannot, because the State itself possesses only derivative powers. All its powers are derived directly from those of the people—the *natural* persons who created it.[35] The people *do* possess the power to discriminate on the basis of race, but, by enacting the fourteenth amendment, they prohibited the State from discriminating. The remaining power of the State was thereby specifically *limited*. Since the State did not possess the power, it could not vest that power in the corporation. And since the powers of the corporation are wholly derivative of the State, *the corporation does not possess the legal power to discriminate because of race.*

Respondent contends that equal protection of the laws is not denied except when the State actively participates in *every* act of a chain of acts ultimately resulting in racial discrimination.[36] Surely the requirement is not so broad. Even in dissenting from a majority opinion declaring that equal protection of the laws is denied when a State merely leases land to a party who later uses it discriminatorily, Mr. Justice Frankfurter said:

> For a State to place its authority behind discriminatory treatment based on color is indubitably a denial by a State of equal protection of the laws, in violation of the Fourteenth Amendment.[37]

Respondent suggests that the scope of this principle is unlimited in application, imposing a new and terrible burden upon the busi-

[34] Barrows v. Jackson, 346 U.S. 249 (1953); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

[35] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

[36] To support its thesis that a corporation can freely discriminate on the basis of race, Respondent cited several cases, which are distinguishable: Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819), was decided long before the fourteenth amendment was enacted in 1868. Moreover, it dealt only with the impairment of the corporate charters by a State, not with the intrinsic limitations of corporate power. Williams v. Howard Johnson Restaurant, 268 F.2d 845 (4th Cir. 1959), did not even concern a corporation and in any event was inferentially overruled by Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). Madden v. Queens County Jockey Club, Inc., 296 N.Y. 249, 72 N.E.2d 697 (1947), very carefully distinguished the *license* involved there "which is no more than a permission to exercise a pre-existing right or privilege," from a *franchise* which is "a special privilege, conferred by the State on an individual which does not belong to the individual as a matter of common right." Slack v. Atlantic White Tower, 181 F. Supp. 124 (D. Md. 1960), was later affirmed, 284 F.2d 746 (4th Cir. 1960), solely on the authority of the *Howard Johnson* case mentioned above. Hackley v. Art Builders, Inc., 179 F. Supp. 851 (D. Md. 1960), was decided by the same district judge who originally decided the discredited *Slack* case. Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert denied,* 339 U.S. 981 (1950), did not consider the present question: Is it possible for the State to vest in an entity of its own creation a power less limited than the power of the State itself? It and the *Slack* case concerned themselves with whether or not *extraneous* interplay between the State and the corporation was sufficient to make corporate acts "State Action." Moreover, after *Wilmington Parking Authority,* the *Stuyvesant* case speaks with a very soft voice indeed. In short, Respondent's cases fail to answer the fundamental question: Where did the corporation receive its power to discriminate?

[37] Burton v. Wilmington Parking Authority, 365 U.S. 715, 727 (1961).

ness community and extending the meaning of "state action" to encompass the acts of *natural* persons in their private capacities. Such arguments misconceive the point. Petitioner does not argue that because the state created the corporation, every act of the corporation is *itself* State action. But every act of the corporation *is* innately subject to the same constitutional limitations to which State action is subject. The limits of this concept are perfectly obvious: it affects nothing or no one that does not derive its very existence solely from the State. This is not a matter of imposing a *new* restriction on corporations. It is a matter of recognizing their inherent incapacities. Nor does the concept force a corporation to do *any* act. It merely restrains it from acting in an unconstitutional manner *if* it acts.

This concept is not revolutionary. It evolves naturally from our heritage and our law. Mr. Justice Harlan, speaking for the Court in *Northern Sec. Co. v. United States*,[38] developed this theme:

> Every corporation created by a State is necessarily subject to the supreme law of the land.[39]
>
> Not even a State, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise the government and its laws might be prostrated at the feet of local authority.[40]

In 1952 Mr. Adolph A. Berle, Jr., Professor of Law at Columbia University and an eminent authority on corporations, gave his support to this concept:

> The emerging principal appears to be that the corporation, itself a creation of the State, is as subject to the constitutional limitations which limit action as is the State itself.[41]

This concept in no way restricts the private right of the *people* to discriminate on *any* basis. But it does say to those who would have the State create a corporate entity for their private use: it is not within the power of the State to create a vehicle for the achievement of private aims which is not subject to the constitutional limitations of power to which the state itself is subject.

Any other conclusion enfeebles the Constitution and foreshadows the emergence of a totalitarian state, for if the State may expand its own powers by conferring upon a lesser entity the power to do that which it cannot do itself, it is no longer subservient to the

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[38] 193 U.S. 197 (1904).
[39] *Id.* at 346.
[40] 193 U.S. at 333.
[41] Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power*, 100 U. Pa. L. Rev. 933, 942 (1952).

people; it knows no bounds. Then will the supreme law of the land be "prostrate at the feet of local authority." Wheat University, a state-created corporation, cannot legally discriminate on the basis of race.

C. *The Public Interest*

1. *Education of the Populace*

By providing academic education on an advanced level open to the public and supported by the State, Wheat University has entered the public domain, because formal education is of such paramount public importance that it cannot escape the realm of the public interest.

One of the great achievements of the American revolution was the establishment of a system of free education. It was an outgrowth of the doctrine, proclaimed by the Declaration of Independence, that all men are created equal. The idea that education is of vital importance to the progress of society and that it should be easily accessible to everyone has been deemed so basic that terms providing for the maintenance of a system of free education have been incorporated into the constitution of every state in the union, including that of Rhea.

Education is considered by the State of Rhea to be so fundamentally important that it *compels* its citizens within a certain age group to attend school. Education is so highly affected with the public interest that more public funds are spent for it than for any other single item. Its character is so intertwined with the public welfare that some states make educational achievement a prerequisite to the right to *vote.*

Recent United States Supreme Court cases illustrate dramatically, that the education of its citizens is a chief function of the state. *Brown v. Board of Education*:

> Today education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship.[42]

Cooper v. Aaron added:

> The right of a *student* not to be segregated on racial grounds . . . is indeed so fundamental and pervasive that it is embraced in the concept of due process of law.[43]

Nor are these pronouncements any less appropriate here because

[42] 347 U.S. 483, 493 (1954).
[43] 358 U.S. 1, 19 (1958). (Emphasis added.)

the cases concerned state established public educational institutions on the elementary or secondary school levels. The responsibility of the state is *to provide* educational opportunities to its citizens, not to provide them through a particular *type* of institution. If, for practical administrative reasons, it chooses to discharge its responsibilities through the medium of state-established schools, it is free to do so. But it may use other methods, too. The fact that its responsibility is discharged through another medium does not in any way alter the character of the obligation it owes its citizens. In the Pottsville area, the state's responsibility of providing adequate university-level educational opportunity to its citizens is being discharged by Wheat University with the cooperative acquiescence of Rhea.

A very recent case, squarely in point, is *Guillory v. Tulane Univ.*[44] In a yet unpublished opinion, the Court held that Tulane University, a privately established,[45] privately endowed school exercised a public function in its educational capacity and that it might not discriminate[46] on the basis of race among applicants for admission to its halls. The court said:

> At the outset, one may question whether any school or college can ever be so "private" as to escape the reach of the Fourteenth Amendment . . . institutions of learning are not things of purely private concern. . . . No one any longer doubts that education is a matter affected with the greatest public interest. And this is true whether it is offered by a public or private institution. . . . Clearly, the administrators of

[44] — F. Supp. — (E.D. La. 1962).

[45] Respondent seeks to distinguish the Tulane case on the basis that Tulane is a part of the public school system of the State of Louisiana. Note the difference between the bulletin of a state supported school and that of Tulane:

Bulletin of L.S.U. 51 (1959):

> Tuition—$25 semester
> Activity fee—$35

Tulane Univ. Undergraduate Bulletin for 1959-60, 61 (1958):

> As an independent university, without support from either church funds or taxes, Tulane must meet its operating costs by income from three sources—student fees, endowments, and gifts.

Id. at 62:

> The tuition fee and total cost at Tulane are, of course, higher than those at state-controlled institutions. . . . They will be found on the moderate side, however, among universities comparable to Tulane—that is, other members of the American Ass'n of Universities *which do not receive tax support.* (Emphasis added.)
> Tuition—$750
> Fee—$100

[46] Guillory v. Tulane University, — F. Supp — (E.D. La. 1962), states:

> A special Louisiana statute . . . apparently requires this discrimination. But that law, and all such laws, must yield to the principle of equal treatment announced in *Brown v. Board of Education,* 347 U.S. 483. The state can no more dictate discrimination in private institutions than it can segregate its own facilities.

> a private college are performing a public function. They do the work of the state, often in the place of the state. Does it not follow that they stand in the state's shoes? And, if so, are they not then agents of the state, subject to the constitutional restraints on governmental action. . . .
>
> Reason and authority strongly suggest that the Constitution never sanctions racial discrimination in our schools and colleges, no matter how "private" they may claim to be.

But, as in the *Tulane* case, the facts "do not require us to go so far." Here, the financial assistance given the University in the form of tax exemptions as in the *Tulane* case make the interest of the state clear. Not often has public support *alone* been sufficient to transform private action into state action, but when such support is coupled with other indications of the public interest, it becomes significant. Here, other indications *are* present. When governmental supports are extended to an institution which by its very nature is already affected with the public interest, it must be assumed that this support is given to help it discharge these quasi-public functions.[47]

2. *A Quasi-public Institution*

Because there is no other state institution of higher learning in Pottsville and the surrounding area, Petitioner cannot pursue his right to an education in a state University without leaving home. The purposeful planning of Rhea's educational system allows Wheat University to fill the need for University education in that area. This is the abdication of a public function by the State to the University. When abdication of a public function takes place, the formerly private agency takes on a quasi-public character because it is performing a public function.

Respondent evades this argument by contending that Wheat University is not a public corporation citing the *Dartmouth College* case.[48] However, the cases establish beyond a doubt that activity by a private entity may so affect the paramount interest of the public that it is the equivalent of state action. From the beginning the principle has been clear that the mere private *form* of an organization cannot change its public character if it exercises a public function. The First Bank of the United States was organized as a private corporation under the "Act to Incorporate the Subscribers to the Bank of the United States." Nonetheless, the Supreme Court found

[47] Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950), relied upon by Respondent, presents no challenge to this view. Even that case admits that it is a matter of *degree*. Here the financial assistance obtained by Wheat University from, through, and because of the State of Rhea is decisive. Wheat performs a public function.

[48] 17 U.S. (4 Wheat.) 518 (1819).

the bank to be "a means of carrying into execution the powers of the government."[49]

Today Federal Reserve Banks are chartered as private corporations with stated capital, public stock subscription, stock certificates, and dividends.[50] Yet these banks have been held to be quasi-public institutions because they perform a public function by exercising immense control over the economic health of the nation.[51] In brief, they are "more than mere private corporations."[52] When a private organization performs a public function, as Wheat University does, it is more than a mere private corporation, it is a quasi-public institution.

This same principle has been applied in many other areas. In the field of labor relations, for example, unions have been denied the right to discriminate in a union shop, because they perform a public function. In *James v. Marinship Corp.*,[53] the court said, "such a union occupies a quasi-public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations."[54]

Because Wheat University performs a public function, it cannot escape the prohibition of the fourteenth amendment. Moreover, Rhea may not abdicate its responsibility to educate its citizens by allowing Wheat University free reign in the Pottsville area. If Rhea so attempts, the University cannot escape its public character. *Smith v. Allwright*[55] made it plain that a private political party can so wield state-given power that its acts are proscribed by the fourteenth amendment. *Rice v. Elmore*[56] extended the concept, and *Terry v. Adams*[57] held a private group accountable to the Constitution simply because the group performed a function designed to discharge a state responsibility. *Marsh v. Alabama*[58] demonstrated that when a private corporation assumes the discharge of a state duty, the validity of its acts is measured by Constitutional limitations on "State Action."[59] It is clear that when a state acquiesces in

[49] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 422 (1819).

[50] *Cf.* Federal Reserve Act, 38 Stat. 251 (1913), as amended, 12 U.S.C. §§ 221-522 (1958).

[51] Anderson v. Cronkleton, 32 F.2d 170 (8th Cir. 1929).

[52] 9 C.J.S. *Banks and Banking* § 552 (1938).

[53] 25 Cal. 2d 721, 155 P.2d 329, 335 (1944).

[54] See Railway Employees' Dep't, AFL v. Hanson, 351 U.S. 225 (1956); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

[55] 321 U.S. 649 (1944).

[56] 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948).

[57] 345 U.S. 461 (1953).

[58] 326 U.S. 501 (1946).

[59] As the Court said in Nixon v. Condon, 286 U.S. 73, 89 (1932), speaking of privately organized institutions:

> [T]hey are to be classified as representatives of the State to such an extent and

the discharge of a public function by a private body, the private organization is clothed with a character that makes *its* action the equivalent of *state* action. It is regarded as a quasi-public institution.

The court below sought to avoid the necessity of deciding this question by joining "the majority opinion in" *Garner v. Louisiana*[60] "in refusing to reach the constitutional issue." However, Petitioner's rights are not so easily dismissed. Here the constitutional issue is presented squarely to the court. Mr. Justice Douglas, concurring in *Garner*,[61] states the argument well:

> One can close the doors of his home to anyone he desires. But one who operates an enterprise under a license from the government enjoys a privilege that derives from the people. . . . The business is not a matter of mere private concern. Those who license enterprises for public use should not have under our Constitution the power to license it for the use of only one race. For there is the overriding constitutional requirement that all state power be exercised so as not to deny equal protection to any group.

Surely, it cannot be supposed that the public has greater interest in the operation of a private restaurant than in the education of its citizens.

The rationale which Petitioner offers to the court is in agreement with even the most reserved analysis of the concept of state action. St. Antoine suggests that the *Shelley* and *Barrows* cases be limited to their facts.[62] Nonetheless, even his test brings Wheat's discrimination within the bounds of state action. St. Antoine would make the "nature of the private activity itself" controlling.[63] The highest public interest is the increase of the intelligence of mankind and the fullest development of his capabilities.[64] That interest is achieved principally through education. The conduct of such education by Wheat University is a public function and therefore state action, underscored by Rhea's financial support and acquiescence in Wheat's conduct. The University cannot constitutionally be permitted to discriminate in violation of the fourteenth amendment.

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in such a sense that the great restraints of the Constitution set limits to their actions.

[60] 368 U.S. 157 (1961).

[61] *Id.* at 184-85.

[62] St. Antoine, *Color Blindness but Not Myopia*, 59 Mich. L. Rev. 993 (1961).

[63] His test is, *id.* at 1011:

> [H]as the state permitted . . . a private party to exercise such power over matters of a high public interest that to render meaningful the type of rights protected by the fourteenth amendment, the action of the private person or organization must be deemed, for constitutional purposes, to be the action of the state?

[64] Pound, *A Survey of Social Interests*, 57 Harv. L. Rev. 1, 33, 36 (1943).

3. *The "Right of Association"*

Respondent seeks to defend its discrimination on the ground of a supposed freedom of association or contract. These "freedoms" cannot avail the University in the present situation, for equal protection of the laws is a higher constitutional right.

In *California State Auto. Ass'n v. Maloney*,[65] the Supreme Court of the United States upheld the constitutionality of the California Assigned Risk Law which forced an insurance company, if it were to do business in California, to enter a contract of insurance with persons whom the company did not wish to insure. The company's "freedom of contract" right gave way to the prevailing interest of California in regulating the insurance industry within its borders. If the freedom to contract with persons of one's choice is subordinated in such a matter, a fortiori, it must give way to the dominant rights guaranteed by the fourteenth amendment, which not even a state may abridge. Any "freedom of contract" defense is frivolous.

Also, as a defense, Respondent asserted, on its own behalf and that of its student body, "freedom of association"—the right to choose with whom one will associate.

It is an easy matter to expose the fallacy of Respondent's contention that *it* will be deprived of *its* right to associate with whom *it* chooses. A corporation cannot associate, in the personal sense, with anyone. Corporations are merely *juristic* persons and are not entitled to invoke the protection of the fourteenth amendment as to the *liberties guaranteed* there. Only as to *property* rights are corporations considered *persons* within its scope.[66] Nor can vague statements to the effect that Wheat University is a community of scholars change the fact that it is a corporation. Its students are *customers*, not members.[67] The medieval concept of *universitas*[68] has been rejected by American law.

As to the alleged rights of present or future Wheat University students to "freedom of association," it is quite doubtful that the University has standing to assert them—whatever they are.

Moreover, the freedom of association protected by the federal constitution is not the right to associate with whomever one pleases, since the other person may not be agreeable to the association. The freedom protected is a negative one: the right *not to be prohibited from* associating with other persons of one's choice, and the right

[65] 341 U.S. 105 (1951).

[66] Pierce v. Society of Sisters, 268 U.S. 510 (1925); 16A C.J.S. *Constitutional Law* § 573 (1956).

[67] *Cf.* 14 C.J.S. *Colleges & Universities* § 24 (1939).

[68] 91 C.J.S. *Universitas* 490 (1955).

not to be forced to associate with anyone *not* of one's choice. The injunction Petitioner requests will interfere with neither of these rights because (1) other students will not at all be *prohibited* from associating with anyone, and (2) no one is *forced* to attend Wheat University and, incidentally, associate with Petitioner.[69]

Respondent attempted below to establish the proposition that the right to "freedom of association" is paramount to the right of Petitioner not to be denied equal protection of the law because of his race. The cases cited there to support the contention all concerned social organizations, union groups, or purely private gatherings. None of them, nor any that can be cited by Respondent to this court, are germane—because the activity conducted by the group was not so highly affected with a public interest that the acts of the group amounted to state action, or because the innate inability of the group legally to discriminate on the basis of race was not adverted to, and, therefore, not decided. This is true of the few published cases concerning private schools.[70]

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[69] *Cf.* McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950).

[70] Kirkpatrick v. Williams, 53 N.M. 477, 211 P.2d 506 (1949). Here plaintiff sought admission to a beauticians school conducted by defendants. Obviously no public interest existed here. Moreover this case did not involve a constitutional issue. The question was whether there was a valid contract between the parties. The court found there was no meeting of the minds, defendant not knowing that the plaintiff was a negro.

Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589 (1909), did not turn on a constitutional point. At issue was the procedural question whether mandamus could be had against defendant. *This* question was decided in defendants favor. By what is obviously pure dictum, the court also recognized claims of the nature here advanced by respondents. It must also be observed that this decision dates from the year 1909 and was made long before the concept of state action was developed to its present status.

Norris v. Mayor of Baltimore, 78 F. Supp. 451 (D. Md. (1948). This is a decision antedating the expansion of the state action concept. Also it involves a *vocational* school in which no particular public interest existed.

Reed v. Hollywood Professional School, 338 P.2d 633 (Cal. Super. Ct. 1959), involved a case of a five year old Negro girl seeking admission to a private school with a highly specialized curriculum having heavy emphasis on the performing arts. Again, this was a case involving an absence of a public interest in so specialized a field of education. Moreover the case essentially turned on the narrow question whether under the California Civil Rights Statute a private school is "a place of public accommodation." This the court refused to find.

In re Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844, *cert. denied*, 357 U.S. 570 (1958). Respondent cannot derive comfort from the fact that the United States Supreme Court denied certiorari after having reversed the original decision of the Pennsylvania Supreme Court, *sub nom.* Commonwealth of Pennsylvania v. Board of Directors of City Trusts, 386 Pa. 548, 127 A.2d 287 (1956), and remanded it, 353 U.S. 230 (1957). In the original proceeding two Negro boys were seeking admission to Girard College simply on the theory that Girard College was a public institution being administered by an instrumentality of the City of Philadelphia, so that discrimination by a public agency would constitute state action. Upon remand the court vacated its original decision and remanded to the Orphan's Court, which, strictly on principles of the law of trusts, removed the Board of Directors of City Trusts as trustee, replacing it with 13 private individuals *in order to prevent the trust from being frustrated.* When reviewing this decision of the Orphan's Court, the Pennsylvania Court, 391 Pa. 434, 138 A.2d 844, 847 (1958), observed that the Supreme Court had not ordered admission of the plaintiffs. Therefore the court rightfully said that as we read it the Supreme Court's opinion held only that the refusal to admit

Petitioner submits that the action of Wheat University in denying him admission to the University was clearly state action denying him equal protection of the laws; his rights under the fourteenth amendment to the Constitution of the United States are not subordinate to the right of a corporation to contract freely and his admission to the student body of the University would in no way derogate *any* other right of *any* person, real or fictional.

D. *Summary*

Petitioner does not seek to *compel* his admission to Wheat University. He seeks to restrain its denial on the illegal basis of race.

Race is an illegal basis on which such denial can be made because: (1) the corporation, Wheat University, possesses only powers derived from the state and the state itself does not possess the legal power to discriminate on that basis; (2) the State of Rhea has abdicated in favor of Wheat University the discharge of a public function—the providing of adequate advance-level educational opportunity for citizens of the Pottsville area—which must be discharged in a manner providing equal protection of the laws; and (3) education is affected with a public interest of such magnitude that it may not be administered with a disregard for the rights protected by the fourteenth amendment to the United States Constitution.

The reasons advanced below for *not* vindicating the rights of Petitioner were: (1) hardship to the University; (2) impairment of contract; (3) freedom of contract; and (4) freedom of association.

Whether or not hardship will be, in fact, visited upon Wheat University because Petitioner's rights are enforced, is entitled to no weight, but, nevertheless, no hardship *will* result therefrom because the reverter Wheat fears cannot legally operate.

There can be no impairment of a void contract, and the charter-contract provision to the effect that Wheat University may only admit Caucasian students is void.

It is well established that the freedom to contract only with whom

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plaintiffs was *incompatible* with the administration of the trust *by a public agency.* (Emphasis added.) The court found (at 848) that Girard College was not actually a "college," but an Orphan's institution where the boys received room, board, and incidentally, instruction. The institution provided a substitute for a *home.* It was not primarily an educational institution.

Tinkoff v. Northwestern Univ., 333 Ill. App. 224, 77 N.E.2d 345 (1947). Here plaintiff was not refused admission on account of race or color. As a matter of fact, the applicant was of the white race. In earlier litigation plaintiff had been refused admission on account of age (he was then only fifteen years old). Later admission was sought again but refused on account of the University's finding that the student's character disqualified him. It is well established that the equal protection clause permits reasonable classifications. The classification was apparently a reasonable one.

one chooses must give way to superior rights. Petitioner's right to equal protection of the laws is such a superior right.

A corporation has no "right to free association" in the personal sense. Such rights exist in natural persons but they are of a negative nature. One has the right *not to be prohibited* from associating with others of his choice who desire such company, and one has the right *not to be forced* to associate with anyone not of his choice. Petitioners' admission would interfere with neither right, because no one would be prohibited from associating with anyone, and no one would be forced to attend Wheat University.

In conclusion, Petitioner does not ask for an extension of *Shelley v. Kraemer*, nor does he ask the court to create new law. He asks merely for the application of legal principles long existing, some of which, it may be, have lain dormant as to the particular question presented here, but which are still touchstones of the law.

II. The Case for Segregation

A. *Private Action Versus State Action*

The doctrine that the fourteenth amendment applies only to state action was enunciated by the United States Supreme Court in the *Civil Rights Cases*,[71] when it said:

> It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment.

The Supreme Court has never deviated from this doctrine. In the more recent case of *Shelley v. Kraemer*,[72] the Court reaffirmed its holding that the fourteenth amendment "erects no shield against merely private conduct, however discriminatory or wrongful."

Petitioner does not directly attempt to contest this well established interpretation of the fourteenth amendment; he seeks ingeniously to avoid it. He asserts that a private educational institution is in fact a quasi-governmental body and that its acts are thus the acts of the state. The facts and the law in no way substantiate this contention.

The question before this court is *not* whether integration of private colleges is or is not morally desirable; rather, it is whether a private institution must be *compelled* to admit individuals which it (for its own reasons) chooses not to admit. Upon the facts, before the court today, the law clearly answers, "No!"

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[71] 109 U.S. 3, 11 (1883).
[72] 334 U.S. 1, 13 (1948).

1. *Wheat University Is a Bona Fide Private Institution in Every Characteristic and Is Not Being Used by the State as a Subterfuge*

It is undisputed that the university was organized by private individuals as a private institution. There are no facts alleged, even by implication, which indicate that the State of Rhea is using Wheat University as a subterfuge to disguise its own action. In fact, the State of Rhea has an extensive system of public institutions of higher learning.[73] There are ninety-five universities, colleges, and junior colleges in the State of Rhea. Of these, fifty-one are public schools, supported by the state or its subdivisions. The petitioner has a legal right to attend any of these public colleges.[74] Most of these are presently integrated.

Of the forty-four private institutions of higher learning, nine were established primarily for Negroes. Of the remaining thirty-five, many have voluntarily admitted Negroes. Negroes have a variety of institutions of higher learning, both public and private, open to them in this state. Wheat University is not a sham created by the State in order to prevent the desegregation of public institutions of higher learning in Rhea. Thus, cases such as *Cooper v. Aaron*,[75] are clearly not in point. Wheat University is still exactly what it has always been for thirty-eight years—a *private* institution of higher learning.

2. *A Private Educational Corporation Is Not an Instrument of the State by the Fact of Its Incorporation or of the Public Service It Performs*

Trustees of Dartmouth College v. Woodward,[76] has been called, "to all intents and purposes a part of the Constitution itself."[77] In that case, Mr. Justice Story distinguished between private and public corporations in the following language:

> The fact, then, that the charity is public, affords no proof that the corporation is also public; and, consequently the argument, so far as it is built on this foundation, falls to the ground. If, indeed, the argument were correct, it would follow that almost every hospital and college would be a public corporation; a doctrine utterly irreconcilable with the whole current of decisions since the time of Lord Coke.
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> When the corporation is said . . . to be public, it is not merely meant that the whole community may be proper objects of the bounty, *but that the government have the sole right, as trustees of the public*

[73] See Educational Directory, United States Dep't of Health, Education, Welfare, Part 3, 169-77 (1961-1962).

[74] Brown v. Board of Education, 347 U.S. 483 (1954).

[75] 358 U.S. 1 (1958).

[76] 17 U.S. (4 Wheat.) 518 (1819).

[77] Stone v. Mississippi, 101 U.S. 814, 816 (1879).

> *interests, to regulate, control, and direct the corporation, and its funds and its franchises, at its own good will and pleasure.* Now such authority does not exist in the government, except where the corporation is in the strictest sense public; that is, where its whole interests and franchises are the exclusive property and domain of the government itself.[78]

This landmark case clearly illustrates that mere incorporation of a college to perfom a public or charitable purpose does not make that educational corporation a public one. The language also defines the large degree of *state control* required to transform such a private corporation into a public corporataion. Wheat University is as independent of the control of the State of Rhea as is any other private citizen or private corporation in the state.

3. *The Fourteenth Amendment Does Not Compel Desegregation of Private Schools*

Respondent submits that no court in the United States, either state or federal, has held that desegregation of private schools is compelled by the fourteenth amendment. The United States Supreme Court in the *Segregation Cases* was very careful to restrict its decision to *public* education. Moreover, in every case in which the issue has arisen, it has been held that an individual is not denied a constitutional right by a private educational institution which refuses to admit him because of his race or any other reason.[79] The

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[78] 17 U.S. (4 Wheat.) at 671. (Emphasis added.)

[79] Norris v. Mayor & City Council of Baltimore, 78 F. Supp. 451 (D. Md. 1948); Reed v. Hollywood Professional School, 338 P.2d 633 (Cal. Super. Ct. 1959); People *ex rel.* Tinkoff v. Northwestern Univ., 333 Ill. App. 224, 77 N.E.2d 345 (1947); State *ex rel* Clark v. Maryland Institution for Promotion of Mechanic Arts, 87 Md. 643, 41 Atl. 126 (1898); Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589 (1909).

The rationale of these decisions is that no state action is involved in discrimination by a private educational institution and that the fourteenth amendment therefore is inapplicable.

Norris v. Mayor & City Council of Baltimore, *supra,* involved the refusal of the Maryland Institute to admit Negroes. The City of Baltimore and the State of Maryland supplied a large amount of financial assistance to this school, which included: a site and a contribution of $20,000 for the building from the city, the rebuilding of this building by the city after a fire with $190,000 of civic funds, $25,000 per annum from city contracts to educate certain students, low rentals on city buildings, a $3,000 per annum grant from the state, and a donation by the state of $175,000 toward the construction of an additional campus.

Nonetheless, in denying the plaintiff's application on the grounds that there was no state action, Judge Chestnut in a sharply analyzed opinion stated:

> In this case the discrimination was made by the Maryland Institute, a Maryland Corporation. The ultimate question, therefore, is whether its action constituted private or public conduct. If the institute is a private corporation, then its conduct is also private. The legal test between a private and a public corporation is whether the corporation is subject to *control by public authority.* . . .

Id. at 456. (Emphasis added.)

Unlike the Maryland Institute, Wheat University did not receive any direct, special financial assistance from any agency of the state. Wheat University is even further removed

present day United States Supreme Court is well aware of the existing public-private distinction, yet it has refused to consider cases which would alter this dichotomy.[80]

Petitioner maintains that the recent case of *Guillory v. Tulane Univ.*[81] breaks through the public-private dichotomy in the field of higher education. Despite the district judge's broad (and unnecessary) dictum, his holding is clearly based upon the public nature of that institution. Judge Wright found the following circumstances upon which the holding is based. Tulane was initially a state university, and after a statutory change to take advantage of a private grant, it continued to operate in its original buildings on state land. Even after this change, the Supreme Court of Louisiana continued to consider it a public school.[82] In addition, it was found that Tulane received a unique tax exemption not extended to other private schools in the state. Its governing board included three high public officials.[83] Other factors such as continued acts of control and regulation by the state over the school were also found to be present. The "public school" nature of Tulane is clear. It is either a segregated public school or a subterfuge for one. The facts of the case at bar are far removed from those in the case of the Tulane University of Louisiana.

4. *There Are Five Basic Categories in Which State Action Has Been Found To Exist, but None Is Applicable to the Facts Before This Court*

All the cases relied upon by petitioner fit into one of the five basic categories discussed below and all are clearly distinguishable from the case at bar. Respondent agrees that these cases do in fact constitute state action, but the case at bar has none of the essentials relied upon by courts therein to find state action.

a. *Direct Action by the State Through Its Officials, Agents, Agencies, and Sub-divisions.*—Found in this category are the public

from state control and consequent state action.

In People *ex rel.* Tinkoff v. Northwestern Univ., *supra,* the question before the Illinois appellate court was Northwestern's rejection of a *qualified* candidate for admission. This case did not involve racial discrimination. The court upheld the right of the University to reject anyone they saw fit, stating, *id.* at 348:

> To say that the University though a private corporation is affected with a public interest is to beg the question. Those corporations are affected with a public interest which are amenable to State supervision. We cannot say that a private educational institution is in a business essentially public in its nature rendering the corporation so engaged subject to public control. . . .

[80] *E.g.,* it had an excellent opportunity in the *Girard College* cases and did not. See *In re* Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844, *cert. denied,* 357 U.S. 570 (1958).

[81] — F. Supp. — (E.D. La. 1962).

[82] See Administrators of Tulane Univ. v. Board of Assessors, 38 La. Ann. 292 (1886).

[83] The Governor of Louisiana, the Superintendent of Schools, and the Mayor of New Orleans.

school cases, *Brown v. Board of Education*,[84] and its successors. That this line of cases is clearly inapplicable here has been practically conceded by petitioner. However, petitioner maintains that acceptance by Rhea of a charter of a private education corporation, with a provision limiting the educational charity to only one race, is per se discrimination by the state.

The mere granting of a charter does not make the acts of a corporation the acts of a state. The fourteenth amendment stands only for the proposition that equal protection and due process cannot be denied by the states. However, the amendment does not prevent the state from *allowing* private corporations to discriminate;[85] it prohibits only affirmative action.

The presence or absence of a discriminatory charter provision is immaterial to the issue in this case. The discriminatory act complained of here is the private institution's denial of admittance to a Negro. It may take this action in the absence of such a charter provision. That chartering of special charitable institutions is not prohibited by law is indicated in *In re Girard College Trusteeship*.[86] There the Pennsylvania Supreme Court held that probating of the will (the necessary judicial act for its effectuation) which set up a trust for poor male white orphans was not the type of state action prohibited by the fourteenth amendment because:

> No one who does not come within the settlor's definition of beneficiary has a constitutionally protected right (or any right for that matter) to share in the charity's benefits.[87]

Equal protection of the law is in fact now being granted to all

[84] 347 U.S. 483 (1954).

[85] Williams v. Howard Johnson's Restaurant, 268 F.2d 845 (4th Cir. 1959); Slack v. Atlantic White Tower, 181 F. Supp. 124 (D. Md.), *aff'd per curiam*, 284 F.2d 746 (4th Cir. 1960); Hackley v. Art Builders, Inc., 179 F. Supp. 851 (D. Md. 1960); Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949); Madden v. Queens County Jockey Club, Inc., 296 N.Y. 249, 72 N.E.2d 697 (1947).

[86] 391 Pa. 434, 138 A.2d 844, *cert. denied*, 357 U.S. 570 (1958).

[87] Prior to this decision, the high Court in Pennsylvania v. Board of City Trusts, 353 U.S. 230 (1957), had held that administration of the trust by city officials was state action violating the fourteenth amendment. Whereupon, the probate court replaced the Board of City Trusts with private individuals as trustees in order to carry out the discriminatory intention of the testator. The Pennsylvania Supreme Court in the quoted case upheld this action, and the United States Supreme Court denied certiorari, allowing the discrimination to continue.

There was a greater exercise of the state's sovereign power in this *cy pres* decision than in granting a charter under general statutory provisions. But the probate of the will and *cy pres* maintenance of a discriminatory testamentary trust by the state are analogous to state acceptance of a charitable corporation's charter limiting the charity to a particular race.

Contrary to the usual situation, the Supreme Court's denial of certiorari in the second *Girard* case is of interest. The Court had originally found unconstitutional state action. If it did not agree with the Pennsylvania Supreme Court's holding, surely it would not allow its previous decision to be flaunted. Its denial fairly indicates tacit agreement that state action no longer existed.

by the State of Rhea. No state law makes discriminatory provisions in a charter mandatory or prevents the granting of charter to integrated associations. Any group can file a charter under which it undertakes to help its own group, or some other group, or all groups. Nothing could be closer to the spirit and ideals of the American system than to grant to all groups equal freedom in this respect. The State of Rhea has, in its grant of a charter to Wheat University and in its policy to treat all groups in similar fashion, afforded the equal protection it owes to all persons and associations of persons in our society.

Charities chartered to aid a particular racial, ethnic, or national group are well established in our law.[88] If Petitioner's contention were correct, a charity could not even incorporate to aid petitioner's race, the Negroes. Such a result would be absurd! There has never been any question of the legitimate purpose of the state in effectuating the charitable aims of its people. Private education is certainly a valid and worthy charity to uphold.[89]

Persons are guaranteed freedom of association under the fourteenth amendment.[90] The State of Rhea has merely allowed the university to change its form of organization from an unincorporated association to a corporate association. The discrimination is the same. The right to discriminate in private association is sanctioned by the Constitution regardless of the form of that association.[91]

The common understanding of the distinction between state and private action must not be cast aside. All private action is state action only under a communist society. Unlike a communistic society, our democratic federal system recognizes sharp distinction between state and private action. Once the common understanding of what is state or private action is disregarded the veriest individual action will eventually be considered to be that of the state. The private corporation in the twentieth century has become the major structure through which private men organize to pursue their private aims. The distinction between action by the state and action by private groups within the state must be made and maintained. The dam that has been erected to protect the private segment of our society must not be shattered.

b. *Basic State Function Performed by a Private Group as a*

[88] See, *e.g.*, San Antonio v. Board of Missions, — Tex. —, 341 S.W.2d 896 (1960), where the court effectuated the purpose of the donor in a charitable trust for a specific nationality, namely the Chinese.

[89] See Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[90] See Louisiana v. NAACP, 366 U.S. 293 (1961); Shelton v. Tucker, 364 U.S. 479 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

[91] See text accompanying notes 119-41 *infra*.

Subterfuge.—The most classic example of this category is the series of cases involving party primaries, of which the recent Texas case of *Terry v. Adams (Jaybird Party)*[92] is one. Elections, being essential to a democratic society are properly an *exclusive* function of the state—not so with education. Though education is a service provided by the state, it has never been deemed wise that education should be solely a state function. A corporation organized for educational purposes was recognized in 1819 as a private function in *Trustees of Dartmouth College v. Woodward.*[93] The value of private education as a supplement to public education, rather than a part of public education, was firmly established in *Pierce v. Society of Sisters.*[94] It has already been made clear that Wheat University is not a subterfuge for the state's educational function as was the situation in *Cooper v. Aaron.*[95]

c. *Exclusive or Monopolistic Rights Granted by State to Private Groups To Perform Public Functions.*—These cases all involve a monopolistic grant of power to a private group. Exercise of power of this nature is generally regulated by governmental authority in order to insure adequate performance of the public function for which it was granted.[96]

Wheat University has been granted no power to act in a particular monopolistic manner.[97] There are ninety-four other educational institutions in the state. Wheat University is not regulated or managed in any way by the State of Rhea. The only educational standards with which Wheat University must comply are those established by the voluntary associations of colleges to which it belongs.

The cases of *Steele v. Louisville & N.R.R.,*[98] and *Oliphant v. Brotherhood of Locomotive Firemen & Eng'rs,*[99] clearly illustrate the point involved here. The *Steele* case held that a union certified under

[92] 345 U.S. 461 (1953).
[93] 17 U.S. (4 Wheat.) 518.
[94] 268 U.S. 510 (1925).
[95] 358 U.S. 1 (1958); see text accompanying notes 73-75 *supra.*
[96] Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960), involved state enforcement of a segregated seating rule of a bus company with exclusive franchise for the city's bus service. The court held that the state could not enforce this seating rule. However, even in this situation, where there was no other bus service available, due to the state action in granting the exclusive franchise, the court, *id.* at 535, stated that the maintenance of such a rule *by the company alone* would not involve state action denying constitutional rights.
[97] But even if a monopoly or exclusive grant were involved, the *Boman* case still holds there would be no unconstitutional discrimination, for it is not necessary to use the police power of the State for Wheat University to refuse to register any student whom it does not wish to matriculate.
[98] 323 U.S. 192 (1944).
[99] 262 F.2d 359 (6th Cir. 1958), *cert. denied,* 359 U.S. 935 (1959).

the Railway Labor Act[100] as exclusive bargaining agent must represent all employees in the bargaining unit without discrimination. The dictum in the *Steele* case, that this holding did not require a private union to admit anyone to membership, was affirmed when that precise question was raised in the *Oliphant* case under the fifth amendment.[101]

d. *Invoking Affirmative State Action To Cause Discrimination.*— Wheat University, as the defendant in this cause, has not invoked positive or affirmative relief. In *Shelley v. Kraemer,*[102] state action was found only because the party seeking to enforce the restrictive covenant necessarily had to seek the aid of the courts of the state to achieve enforcement of the covenant.[103] Even the *Shelley* case recognized that voluntary adherence to the restrictive covenant is lawful. In the situation before the bench, the University need never invoke the aid of the Courts of Rhea in order to prevent students, which it wishes to exclude, from enrolling.[104]

The Supreme Court of Maryland recently held that no state discriminatory action was involved in criminal prosecution for disorderly conduct of Negroes seeking admittance to a segregated private park.[105] The court stated as to the prosecution:

> It was at least one step removed from State enforcement of a policy of segregation and violated no constitutional right of appellants.[106]

[100] 48 Stat. 1185 (1934), 45 U.S.C. §§ 151-64 (1958).

[101] *Cf.* Bolling v. Sharpe, 347 U.S. 497 (1954).

[102] 334 U.S. 1 (1948).

[103] Compare Charlotte Park & Recreation Comm'n v. Barringer, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied,* 350 U.S. 983 (1956). Here the North Carolina court found a limitation in a grant of land for public park purposes restricting use to the white race only to be a valid fee simple determinable. Under the law of that state, this grant would revert automatically, without intervention of the state judiciary, if Negroes should use the land. *Shelley v. Kraemer* was said, therefore, to have no application.

[104] Petitioner places emphases on the concurring opinion of Justice Douglas in Garner v. Louisiana, 368 U.S. 157 (1961). This case involved arrests of Negro sit-inners at drug store lunch counters in Louisiana for breach of the peace. The convictions were reversed by the majority of the Court on the ground of lack of evidentiary support for the verdict, and the constitutional question of state action was not reached. Justice Douglas in his concurring opinion found state action involved in the discrimination because of the overwhelming support the state gave to the custom of segregation in the state. This concurring opinion, though enunciating an interesting doctrine of state action without state action, is not applicable here because (i) this opinion was not the law of the *Garner* case, (ii) this opinion does not express the holding of any other case decided by any court in our entire judicial system at any time, (iii) this opinion is directed at the peculiar state of affairs existing in Louisiana, which differs appreciably from that in the State of Rhea, and (iv) there is no breach of the peace or trespass enforcement (or any other kind of legal action) involved in our case.

However, *Garner, supra,* and *Barringer, supra* note 103, do aid in a logical analysis of where the situation of Wheat University should be placed in a logical progression of the *Shelley* decision. Any state action in *Garner* and *Barringer* comes after the discriminatory event has taken place; and such state action is apart from the discrimination and does not effectuate it, though it arises because of the discrimination. Therefore, *Garner* and *Barringer* are at least one important step removed from *Shelley,* in which the action of the state was required to effectuate the discrimination.

[105] Drews v. State, 224 Md. 186, 167 A.2d 341 (1961).

[106] *Id.* at 345.

Other state and federal courts have made the same distinction where the action of the state is thus separated and unconnected with the discrimination. It is doubtful that the Supreme Court will nullify this distinction.[107]

e. *Control of Private Individual or Group by State Through Management and Direct and Extensive Financial Support.*—Tax exemption benefits given to a private educational and charitable institution do not give the state such control over the private institution as to make its action state action.

Wheat University has received all of its income from private donations or tuition paid by private parties. No property of any nature has been received from the state. Apart from the federal loan, the only financial aid Wheat University has received from governmental units has been the general tax exemption extended to other schools, churches, hospitals, and similar charitable organizations. The purpose of such exemptions is to encourage the *private* undertaking of such activities. No discrimination by the state is involved where these same benefits are available to any similar private institution without restriction as to whom they can serve. Non-discrimination is the policy of Rhea tax exemptions, not discrimination.

The extent to which the courts have refused to hold that financial aid to an institution gives the state such control over it as to make its actions state action exposes the flimsy nature of petitioner's contention regarding tax exemptions.

Maiatico Constr. Co. v. United States[108] asserted:

> [T]he generosity of the government is not enough in itself to change the character of the corporation from private to public.[109]

[107] But note that our situation is one more important step removed from *Garner, Barringer* and *Drews,* and thus two giant steps from *Shelley,* since no state action whatsoever is required to effectuate or to enforce a denial of matriculation by Wheat University.

[108] 79 F.2d 418, 421 (D.C. Cir), *cert. denied,* 296 U.S. 649 (1935).

[109] This case may be particularly appropriate because it involves a predominately colored university, and the issue was not one pertaining to race relations. Federal statutes required that a bond be executed by contractors on construction of *public* work. Congress made a large annual appropriation for construction, maintenance, and development of Howard University, including payment of the personnel, and it contracted for the erection of the buildings. In a suit claimed to be on the contractor's bond required by statute, the question was whether Howard University had lost its private character.

The court found that Howard University had retained its private character and said, *id.* at 421:

> Congress has passed no law giving . . . any . . . officer of the government *control* of the University, and we think it obvious that it could not do so without the consent and approval of the corporate authorities of that institution. Hence, in the view we take, the generosity of the government is not enough in itself to change a private into a public institution. (Emphasis added.)

See also Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

The Court of Appeals for the Fourth Circuit recently upheld the exclusion of Negro M.D.'s from courtesy staff privileges in a North Carolina hospital. The exclusion was made solely because of their race. In this case, *Eaton v. James Walker Memorial Hosp.*,[110] the land upon which the hospital stood had been acquired by the city and county.[111] Aid received was from a contract for services rendered to county indigent patients. It is interesting that this case was decided by the same circuit which had earlier decided *Kerr v. Enoch Pratt Free Library*.[112] Note how the court carefully distinguishes the cases:

> In short, it was shown that the Library was so completely subsidized by the City that in practical effect its operations were subject to the City's control. In the pending case, as we have shown, the hospital is neither owned nor controlled by the municipalities and the revenues derived from them on a contract basis amount to less than 4½ per cent of its total income.[113]

Financial assistance alone is not sufficient to turn private action into state action. A large degree of *control*, accompanying the financial assistance, is required. *Dorsey v. Stuyvesant Town Corp.*,[114] indicated the great extent to which a state can regulate and supply financial assistance to a corporation it has chartered without achieving such control as to have the acts of the private corporation constitute state action. There the New York Court of Appeals decided that a private corporation which had received considerable government aid was privileged to exclude Negroes from consideration as tenants in Stuyvesant Town apartments owned by the corporation.[115]

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[110] 261 F.2d 521 (4th Cir. 1958).

[111] The hospital had been operated under municipal authority from 1881 to 1901, at which time, to take advantage of a private donation, it was conveyed to trustees of a private corporation. However, for fifty years thereafter it received financial help from the city and county.

[112] 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945).

[113] 261 F.2d at 527.

[114] 299 N.Y. 12, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950).

[115] The state assistance and regulation of Stuyvesant Town Corp. included the following: incorporation under a special law designed to encourage housing redevelopment, a declaration by the corporation that it was organized to serve a public purpose and would remain subject to governmental supervision and regulation; adoption of a contract by the City of New York to initiate the Stuyvesant Town apartment project with full knowledge that the corporation reserved the right to select tenants and would pursue a discriminatory policy in that regard; subsequent approval of the contract by the State Superintendent of Insurance and the Board of Estimate of New York State; maximum rents and profits fixed by the government; government limitations on financing, mortgaging, altering, or selling of the property; exemption from ad valorem taxes on improvements; use of the city's eminent domain power to secure the 18 city blocks for the 35 apartment houses; transferring and rearranging of city streets to accommodate the project; and ultimate reversion of Stuyvesant Town Corp. surplus assets to the public on dissolution.

A dissenting justice believed that *Marsh v. Alabama*,[116] was applicable, but the majority distinguished it and stated:

> To say that the aid accorded respondents is nevertheless subject to these requirements [Fourteenth Amendment limits on state action] on the ground that helpful cooperation between the State and the respondents transforms the activities of the latter into State action, comes perilously close to asserting that any state assistance to an organization which discriminates necessarily violates the Fourteenth Amendment.[117]

Stuyvesant Town Corp. was brought into being under special statutory provisions under which it was closely regulated. The project was made possible by contract with the City, it was a geographic entity created through the City's use of eminent domain, and it was an economic entity aided by the City. Yet its private nature was upheld and no state action was found by the highest court of New York, a state which has been in the forefront in the fight against discrimination. General tax exemptions to an education institution, especially where not steeped with the public purpose involved in *Stuyvesant*, are far removed from the financial aid and control required to transform private action into state action.[118]

There is no control of Wheat University by the State of Rhea. No control over the management of the University has passed from the trustees of Wheat University into the hands of the government by the acceptance of these general tax exemption benefits. An argument for state action based on tax exemption benefits is unfounded.

B. *Freedom Of Association*

1. *The Right of a Private Association To Admit Only Members of Its Own Choosing Has Been Repeatedly Established*

There is no legal precedent for compelling Wheat University to admit petitioner to its private community. In fact, the right of a

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[116] 326 U.S. 501 (1956).

[117] 87 N.E.2d at 541.

[118] For other cases holding that financial aid (and regulation) by governmental units to private groups did not change their private nature see Barnes v. City of Gadsen, 260 F.2d 593 (5th Cir. 1959), *cert. denied*, 361 U.S. 915 (1960) (state financial benefits to urban renewal project which discriminated); Hackley v. Art Builders, Inc., 179 F. Supp. 851 (D. Md. 1960) (water and sewage disposal service furnished to housing developer who discriminated); Mitchell v. Boys Club, 157 F. Supp. 101 (D.D.C. 1957) (boys club which discriminated aided by police in fund raising, supervision during duty hours, and other ways, and allowed to use certain abandoned fire stations in the District with water, heat, and light furnished by the District); Norris v. Mayor & City Council of Baltimore, 78 F. Supp. 451 (D. Md. 1948) (large financial grants and assistance to private school from city and state); Edson v. Griffin Hosp., 21 Conn. 55, 144 A.2d 341 (1958) (granting of state and municipal aid); Wilmington Gen. Hosp. v. Manlove, 174 A.2d 135 (Del. Sup. Ct. 1961) (hospital received grants of public funds and exemption from taxation); West Coast Hosp. v. Hoare, 6 So. 2d 293 (Fla. Sup. Ct. 1953) (grants of public funds); Levin v. Sinai Hosp.,

private association to select its own members on the basis of its own requirements has been repeatedly established.[119]

A case which clearly indicates the vitality and strength of this right of a private association to choose its own associates is *Oliphant v. Brotherhood of Locomotive Firemen & Eng'rs.*[120] In this case Negro firemen brought an action to compel the union to admit them to membership. The union had been certified as the exclusive bargaining representative, and its constitution forbade the admission of Negroes to membership. Even though the federal government had stripped the plaintiffs of their bargaining privileges as individuals and conferred that function upon a majority elected representative, over which the individual plaintiff had no direct control and in which he was not eligible for membership, the court still held that the discrimination by the union was not state action:

> The Brotherhood is a private association, whose membership policies are its own affair, and this is not an appropriate case of interposition of judicial control.[121]

A hardship was imposed upon these Negro firemen by the federal government's action in conferring exclusive bargaining authority upon a union in which they could not gain membership. Still, the right of a private association to select its own members according to its own standards was held inviolate. Our situation involves no such hardship, for no special authority has been conferred on Wheat University. There are many other educational institutions of equal quality in our state which petitioner is free to attend.

The right of private associations to choose their own members is basic in our society. Moreover, it is protected by the first and fourteenth amendments to the United States Constitution.

2. *It Is Beyond Debate That Freedom To Engage in Association for the Advancement of Beliefs and Ideas Is an Inseparable Aspect of the "Liberty" Assured by the Due Process Clause Of The Fourteenth Amendment*

186 Md. 174, 46 A.2d 298 (1946) (supported in part by public funds); Van Campen v. Olean Gen. Hosp., 210 App. Div. 204, 205 N.Y.S. 554, *aff'd*, 239 N.Y. 615, 147 N.E. 219 (1925) (although exempted from taxation).

[119] North Dakota v. North Central Ass'n, 99 F.2d 697 (7th Cir. 1938); Cline v. Insurance Exch., 140 Tex. 175, 166 S.W.2d 677 (1942); Manning v. The San Antonio Club, 63 Tex. 166 (1885); Terrell Wells Swimming Pool v. Rodriquez, 182 S.W.2d 824 (Tex. Civ. App. 1944—San Antonio) *error ref.*; Harris v. Thomas, 217 S.W. 1068 (Tex. Civ. App. 1920—Amarillo) *no writ hist.*; see Mayer v. Stone Cutter's Ass'n, 47 N.J. Eq. 519, 20 Atl. 492 (1890); McKane v. Democratic Gen. Comm., 123 N.Y. 609, 25 N.E. 1057 (1890).

[120] 262 F.2d 359 (6th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959).

[121] *Id.* at 363.

The above heading is a quotation from *NAACP v. Alabama.*[122] The court pointed out that this freedom exists whether it pertains to political, economic, religious, or cultural matters.[123] This freedom of association is essential to the unhampered exercise of the enumerated first amendment freedoms. The "close nexus" between association and these freedoms has indeed been recognized by the Court.[124]

The only way for petitioner to gain admittance to Wheat University is for the state, through state action, to compel admittance. Respondent respectfully submits that a judicial mandate forcing admission of any student upon the private association of persons who collectively comprise Wheat University will be, in itself, a violation of their freedom of association. This freedom is protected against state action by the due process clause of the fourteenth amendment. Such a mandate by this court would be affirmative state action.[125]

The value of private educational institutions and the reality of their private rights has been clearly recognized in such notable Supreme Court decisions as *Trustees of Dartmouth College v. Woodward,*[126] and *Pierce v. Society of Sisters.*[127] A corollary to the right to conduct private schools, if it is to have any meaning, is that the schools have a right to be private. To achieve such privacy the Board of Trustees of a school must have the right to admit whomever they wish. To deny the right of Wheat University to refuse matriculation on its own standards would be to deny the right of a community of scholars to associate freely together in the pursuance of educational or cultural matters. This right is protected by the fourteenth amendment.[128]

The fact that the particular standards around which an association is formed (in our case a limitation of the association to members of the Caucasian race) are controversial or debatable as to their moral correctness does not decrease the strength of this right. In fact, the right thereby takes on more vitality. In *NAACP v. Alabama,* the court stated:

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[122] 357 U.S. 449, 460 (1958).

[123] See Louisiana v. NAACP, 366 U.S. 293, 296 (1961), and Shelton v. Tucker, 364 U.S. 479 (1960), stating:

> We deal with a constitutional right, since freedom of association is included in the bundle of First Amendment rights made applicable to the States by the Due Process Clause of the Fourteenth Amendment.

[124] NAACP v. Alabama, 357 U.S. 449 (1958). In regard to this emerging constitutional right see Solter, *Freedom of Association—A New and Fundamental Civil Right,* 27 Geo. Wash. L. Rev. 653 (1959).

[125] Shelley v. Kraemer, 334 U.S. 1 (1948).

[126] 17 U.S. (4 Wheat.) 518 (1819).

[127] 268 U.S. 510 (1925).

[128] NAACP v. Alabama, 337 U.S. 449 (1958).

> Effective advocacy of both public and private points of view, *particularly controversial ones,* is undeniably enhanced by group association, as this court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate *is subject to the closest scrutiny.*[129]

The private group of interested persons who donated their time, efforts, and finances to the organization of Wheat University did so with the intent of creating an educational and cultural community limited to Caucasians. Other persons through the years have contributed their time, efforts, and financial support to this institution with reliance on its original nature and purposes. The faculty members accept their position in the community with full knowledge of its composition. Students come to Wheat in order to associate with the educational community there. Whatever their reasons, the freedom of association of the members of various segments of this educational community is in question before this court today.

The free men who comprise the community that is Wheat University are gathered together for free discussion of political, economic, religious, and cultural matters. Their freedom to make their own cultural choices as to their associations and to continue their association, which inescapably involves the constant examination and promulgation of beliefs and ideas, is inviolate under the fourteenth amendment.

Can it be maintained that a state may, in the guise of prohibiting discrimination, seriously impair the rights of citizens to associate with those of their choosing? Respondent thinks not. But that would be the result of granting petitioner's plea.

3. *A Private Educational Corporation Has Standing To Assert the Constitutional Right to Freedom of Association of Those Within Its Community, and, Furthermore, Has Standing To Assert These Rights Because of Its Own Interest in Protecting Its Enrollment, Its Financial Support, and Its Existing Property*

Petitioner seeks to question the standing of the Trustees of Wheat University to raise the question of freedom of association for its founders, its sustainers through the years, and its faculty and students. However, this question was foreclosed by *NAACP v. Alabama.* There the Court stated:

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[129] *Id.* at 460. (Emphasis added.)

> To require that it [their constitutional rights] be claimed by the members themselves would result in nullification of the right at the very moment of its assertion. Petitioner is the appropriate party to assert these rights, because it and its members are in every practical sense identical.[130]

The NAACP in that case was representing the rights of contributors to and members of an association organized in corporate form. Similarly, the constitutional rights of the members of the Wheat University community cannot be effectively vindicated except through their appropriate representative. The Board of Trustees is the focal point of this community of scholars and speaks in its behalf. In asserting the right of the community to organize around the basic standards upon which it was founded, the Board is in every practical sense identical with the community and is its appropriate representative.[131]

A decision forcing Wheat University to admit petitioner would destroy the constitutional rights of the sustainers and members of this academic community. Such a decision would be res judicata as to any action they might later bring. Their rights must be protected now or never.

Wheat University can also assert the constitutional rights of its members to freedom of association because of its property interests. In *Pierce v. Society of Sisters*[132] the Court stated:

> Appellees are corporations and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. . . . But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action.

The reliance of donors to Wheat University upon its Caucasian character is clear from the facts. Students and faculty have chosen to associate in a university of this character. Only a "reasonable likelihood" that Wheat University might have diminished financial support in the future need be shown for it to have standing to assert the constitutional rights of its sustainers and members under *NAACP v. Alabama*.[133]

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[130] 357 U.S. at 459.

[131] The NAACP's standing to sue for the rights of its members was upheld and further clarified in Louisiana v. NAACP, 366 U.S. 293, 295, 296 (1961). Mr. Justice Douglas stated: "The NAACP is a New York corporation . . . ." "It is clear from our decisions that the NAACP has standing to assert the constitutional rights of its members."

[132] 268 U.S. 510, 535 (1925).

[133] 357 U.S. 449 (1958).

But, should petitioner's alleged right be upheld, respondent is very likely to lose the fifty acre tract donated to it in 1936, together with the classroom buildings and men's dormitories located thereon. Petitioner claims that no reversion would take place due to *Shelley v. Kraemer*.[134] However, the *Shelley* case only applies to judicial enforcement of discriminatory covenants. Here a determinable fee is involved. It will terminate automatically, without court enforcement, at the very instant petitioner is admitted to Wheat University. Any judicial decree as to title will be to uphold a title that has already vested by the reversion. The provision in the deed for reversion is not void *ab initio*, for *Shelley* states that a discriminatory covenant is valid. By analogy, so are discriminatory deed provisions.

The distinction involved between court enforcement of discriminatory covenants and the valid operation of reverters in determinable fee provisions was cogently drawn in *Charlotte Park & Recreation Comm'n v. Barringer*.[135] A determinable fee provision similar to the one involved here was held valid in that case. No case of which respondent is aware has held to the contrary.

Petitioner cites *Guillory v. Tulane Univ.*[136] as an identical case sustaining his position. That Judge Wright did not purport to decide the validity of the reversion in that case is pointed out in his sixth footnote:

> Whether non-compliance with the condition would support an action for rescission of the donations is a state law question which this court need not decide.

The state law in Rhea recognizes that a determinable fee reverts at the instant of the condition specified without any judicial enforcement.[137] This law does not discriminate in violation of the fourteenth amendment but merely prescribes the nature of a particular interest in private property, the possibility of reverter.[138]

Whatever dispute may exist as to the limit of the thrust of *Shelley*, or as to its interpretation, or as to the validity of *Barringer*, the fact that the outcome of these disputes is unsettled puts Wheat University in danger of losing this valuable property should a decision adverse to the rights of association of its members be rendered.

Therefore, Respondent has standing to assert the constitutional

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[134] 334 U.S. 1 (1948).

[135] 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956).

[136] — F. Supp. — (E.D. La. 1962).

[137] *E.g.*, Cragin v. Frost Nat'l Bank, 164 S.W.2d 24 (Tex. Civ. App. 1942—San Antonio) *error ref.*

[138] See *In re* Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844 (1955), *cert. denied*, 357 U.S. 570 (1958), for a similar distinction between state action which determines private property interests and state action which enforces discrimination.

rights of its members, both because such rights can only be effectively asserted by Respondent and because denial of those rights will in all likelihood cause great property loss to Respondent.

4. *The Constitutional Right of Freedom of Association by Private Individuals in Privately Organized Associations Far Outweighs Any Right Petitioner Might Assert To Be Free From Discrimination in Society*

Petitioner frankly admits that he must secure an extension of the concept of state action in order to prevail in this cause. He admits that with the exception of a newly-born federal court decision, as yet untried by the process of appellate procedure (and clearly distinguishable on the facts), he has no authority on point to support his view. Yet he urges that this high court of our state should extend the definition of state action to meet the factual situation here. He claims that this is necessary in order that minority groups be allowed the fullest expression of their civil liberties under the protection of the fourteenth amendment.

But even granting the validity of all that petitioner claims (which we are convinced is refuted by the weight of authority, as has been argued heretofore), he has established only that his plea is entitled to be considered by this court. Petitioner must proceed further and establish not only that he has a constitutional right entitled to be heard here, but that this constitutional right is superior to the constitutional protection afforded the Respondent. This we submit he cannot do.

The recent decision in *International Ass'n of Machinists v. Street*,[139] indicates that there is a point at which the rights of freedom of association predominate over other public policy considerations. In this case the majority of the Court applied the oft used "balancing test" between the public policy considerations in favor of allowing the union shop in interstate railroads and the constitutional rights of freedom of association of individual railroad employees. The Court *halted the forced association at the point of association for advancement of ideas and causes with which the individual did not agree.* Such forced association could not extend into the idealogical or personal realm of the individuals involved. Thus (even when the government does act to enforce association, as in collective bargaining), there are limits to the association that can be required.

The Court only allows forced association where the industrialization and complexity of our society require it for such things as

[139] 367 U.S. 740 (1961).

collective bargaining, or an integrated bar association to handle the organization and discipline of the legal profession.[140] There has been no showing of representational or of industrial necessity in our case. Moreover, the facts show that forced association is decidedly unnecessary, for there is a wide variety of state and private institutions of higher learning open to petitioner. The allegations in no way substantiate that these institutions are not close at hand, or that these institutions are lacking in the courses of study petitioner wishes to pursue. We assert that the opposite is the actual situation. Within one hour or less of downtown Pottsville, there are five institutions of higher learning that will accept the petitioner.

The forced admittance of petitioner will undoubtedly result in financial damage to respondent in many ways as discussed above. This factor is worthy of consideration in any balance made between the alleged right of petitioner to gain admittance by force to a private institution and the constitutionally guaranteed right of freedom of association of the members of that institution.

5. *Conclusion*

That the value of private association is recognized in private education is pointed out by Arthur S. Miller:

> In addition, extending the concept of state action to true private education would tend to jeopardize all types of private group activity. Only the most compelling reasons would lead the Court to open that "Pandora's box." And much of the virtues of private education are existent because it is private and not controlled, except in a tenuous manner, by the state. There are values to be preserved, both individual and societal, by a continuation of the present system of education.[141]

This statement expresses the root of the problem. Each individual citizen is both the creator and the creature of the state. Our status as twentieth century citizens of the state and of the United States is the result of governmental action. We come into the world as the product of a marriage that has been regulated by the state. From then on our livelihood is affected and regulated by the state in countless ways. Are we then, as creatures of the state in many respects, engaged in state action when we decide whom we shall admit to our home or dinner table? All agree that the answer is "no." Then where is the line to be drawn? The answer thereto has been provided by the wisdom of the law.

The line has been drawn in the cases presented by respondent. The petitioner seeks to trespass beyond this line into the realm which has

[140] *E.g.*, Lathrop v. Donohue, 367 U.S. 820 (1961).

[141] Miller, *Racial Discrimination and Private Schools*, 41 Minn. L. Rev. 245, 263 (1957).

always been reserved for the freedom of private individuals in private association. He seeks not legal equality, but private equality enforced by sanction of law. To grant such a contention is to give to the minority group legal superiority, not equality.

In a free society all persons face discrimination in myriad forms from the time of birth. Much of this discrimination is morally reprehensible. Some of it is justified. But the question before this court today is not whether the discrimination in question by Wheat University is good or bad. The question is whether private individuals and private groups are to remain free to make their own decisions on such questions. Diversity is the one great principle of our society. There is no party line to which all must adhere. The state is not the ultimate for which all live in our society. The private individual, acting in his own way, is the ultimate. Our basic principles of government require a sharp distinction between state and private action.

In a diverse society discrimination is inevitable, as diverse groups seek different ways to make their lives and the lives of others better and more meaningful. A basic tenet of our society is that the best society will be produced by individual private action, as each individual responds to the commandment of his God, not the coercion of his state. Private action must remain free so long as it does not interfere with the rights of others. *Respondent has interfered with the private rights of no one in its self-assumed task of supplying an education to those in its community.*

Under the law, respondent's private admission judgments have not constituted state action. Even if this were not so, respondent has an affirmative constitutional right which protects his action. Therefore, whatever the moral judgment of this court might be, the law and the best interests of our society as a whole, now, and for the future, dictate a decision that respondent be allowed to continue its private right to associate freely, and consequently, to discriminate freely.